IN THE HIGH COURT OF BOMBAY AT GOA
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LETTERS PATENT APPEAL NO. 14 OF 2001 IN
FIRST APPEAL NO. 79 OF 2001

Shri Dhananjay alias
Dilip Naik,major, married,
r/o Malbhat, Curca,
Ilhas, Goa. ... Appellant.

Versus

Smt. Milan D. Naik,
major, married, r/o
Pandurang Vast,
Headland, Sada,
Vasco da Gama, Goa. ... Respondent.

Mrs. A. A. Agni, advocate for the appellant.

Mr. R. B. D'Sa, advocate for the respondents.

CORAM: V.C. DAGA &
P.V. HARDAS, JJ.

DATE: 18th June, 2002.

ORAL JUDGMENT (Per V.C. Daga, J.)

Admit. Heard finally by consent of the parties.

2. The facts in a nutshell are as under:-

The suit for divorce filed by the husband-original plaintiff/appellant herein; on 15th September, 1988, against the wife-original defendant/respondent herein; on the ground that the defendant left her matrimonial home on 22nd December, 1995, and is living separately in complete abandonment of the conjugal domicile. Incidentally, certain allegations of mental agony, pain and suffering were made in para 6 of the plaint. The said suit came to be

registered as Divorce Suit No.119 of 1998 on the file of Civil Judge, Senior Division, Panaji, Goa. On being summoned, the respondent-wife (original defendant) appeared before the trial Court and filed her written statement raising a preliminary objection to the maintainability of the suit on the ground that under Article 4(5) of the Law of Divorce in force in Goa, the suit was premature as the same was filed before the expiry of three years from the date of abandonment of conjugal domicile. The trial Court was pleased to frame only one issue with respect to the ground of abandonment of conjugal domicile and decided the said issue after full trial of the suit. The trial Court recorded twin findings, whereunder the trial Court held that the suit was premature, being filed before the expiry of period of three years from the date of abandonment of conjugal domicile and recorded adverse findings on merits holding that the plaintiff failed to prove abandonment of conjugal domicile. In the result, the suit was dismissed on the ground of limitation, holding it to be premature, as well as on merits, by judgment and decree dated 19th April, 2001.

3. Being aggrieved by the said judgment and decree, First Appeal was carried to this Court, being Regular First Appeal No.79 of 2001. The same came to be dismissed in limine by a speaking order wherein it was held that the suit was filed three months prior to the

period of completion of abandonment, as such the suit was premature and the same was not maintainable.

4. Being aggrieved by the said Order of the learned Single Judge, the present Letters Patent Appeal is preferred by the original plaintiff.

5. The learned counsel appearing for the appellant contended that the learned Single Judge failed to notice that the decree for divorce was also sought on the ground of cruelty, as such appeal could not have been dismissed, holding the suit to be premature. There is no consideration of this question either in the judgment of the trial Court, or in the order of the learned Single Judge of this Court, as such the impugned Order needs to be set aside.

6. The learned counsel for the appellant further submitted that when the learned Single Judge found that the suit as filed was premature and the same was not maintainable, in that event, the trial Court had no jurisdiction to deal with the suit as such, the findings recorded by the learned trial Court on merits, while dismissing the suit, ought to have been set aside. She further submitted that if the suit was premature, then in that event, it was open for the original plaintiff/appellant to file fresh suit after completion of the period of abandonment as envisaged under Article

4(5) of the Law of Divorce in force in Goa. In her submission, decree of dismissal of suit on merits and confirmation thereof by this Court will come in the way of the appellant, if the appellant in future decides to initiate fresh proceedings for divorce.

7. The learned counsel for the appellant, borrowed support to her second submission from the judgment of the Apex Court in the case of **Athmanathaswami Devasthanam** vs **K. Gopalaswami Ayyangar,** AIR 1965 SC 338, to contend that the Civil Court having no jurisdiction over subject-matter of suit, cannot decide any question on merits. It can simply decide question of its jurisdiction. She placed reliance on para 13 of the said judgment, which reads as under:-

> "(13) The last point urged is that when the civil court had no jurisdiction over the suit, the High Court could not have dealt with the cross-objection filed by the appellant with respect to the adjustment of certain amount paid by the respondent. This contention is correct. When the Court had no jurisdiction over the subject matter of the suit it cannot decide any question on merits. It can simply decide on the question of jurisdiction and coming to the conclusion that it had no jurisdiction over the matter had to return the plaint."

In her submission, if the suit was premature, the Court had no jurisdiction to entertain and try the suit. If

that be so, no findings on merits could have been recorded by the trial Court and such a decree could not have been confirmed by the learned Single Judge of this Court by dismissing the First Appeal in limine.

8. Per contra, learned counsel for the respondent submitted that no cause of action was made out by the appellant/original plaintiff warranting issue with respect to the ground of cruelty. No exception was taken by the appellant when the trial Court did not frame issue on this count. He further submitted that no divorce was sought on the ground of cruelty in the suit, and as such, no fault can be found with the judgment of the trial Court as well as with respect to the Order of the learned Single Judge of this Court.

9. The learned counsel for the respondent tried to meet the second ground raised by the appellant and tried to support the judgment and decree of the trial Court and also that of the learned Single Judge on this count, but found it difficult to take his submissions to the logical end.

10. Having heard the parties at length and having perused the plaint filed in the suit, we do not agree with the first submission advanced by the learned counsel for the appellant that he was also seeking

divorce on the ground of cruelty. The pleadings, if any, are absolutely vague and did not make any cause of action for want of material facts and material particulars. The pleadings in para 6 of the plaint sought to be relied upon by the appellant, did not make out any ground of cruelty. These pleadings were incorporated in the plaint only to provide foundation to contend that the matrimonial ties between the plaintiff and defendant have broken down completely. In this view of the matter, no issue could have been struck by the trial court, with respect to the ground of cruelty. The trial Court rightly did not frame issue on this count. Consequently, none of the parties was at issue so far as the ground of cruelty was concerned. No evidence is to be found in this behalf from either side. As such, the first contention raised by the learned counsel for the appellant is devoid of any substance. It needs out-right rejection.

11. So far as the second contention raised by the appellant is concerned, we are of the opinion that if the suit was premature then, in that event, the trial Court had no justification to record findings on merits. In this view of the matter, we are also of the opinion that the learned Single Judge while dismissing the appeal ought to have set aside the findings recorded by the trial court on merits. We, while sustaining the Order of the learned Single Judge, holding that the suit

was premature and the same was not maintainable, make it clear that the findings recorded by the trial Court on merits being without jurisdiction, shall not come in the way of the appellant if the appellant in future decides to file fresh suit, on the same ground. With this clarification, the Appeal stands disposed of, with no order as to costs.

V. C. DAGA, J.

P. V. HARDAS, J.